Waterway and Wetland Handbook
CHAPTER 200
WETLANDS

GUIDANCE PURPOSE AND DISCLAIMER

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CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: May 12, 2005

Insert: CHAPTER 200
Waterway and Wetland Handbook

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Bureau of Wildlife Management

FROM: Michael Staggs, FH/4 MWS

SUBJECT: Guidance for Permitting of Wetland Conservation Projects, Wisconsin Administrative Code NR 353.

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Purpose of this Guidance
This guidance applies to all wetland conservation projects qualifying for a general permit under chapters NR 353 and 343, Wisconsin Administrative Code. This guidance also applies to projects conducted under the Memorandum of Agreement with the U.S. Fish and Wildlife Service and the Natural Resources Conservation Service.

Qualifying for a conservation project permit
To qualify for a general permit the basic purpose of the proposed project must be wetland conservation - the restoration, enhancement, preservation or management of wetlands.

Ch. NR 353 does not authorize a project whose basic purpose is not wetland conservation, such as a driveway through a wetland, even if the project will result in wetland creation or enhancement. For example, the construction of a detention basin in wetlands for stormwater management would not qualify for the general permit, even if the detention basin or the project of which the basin is a part will also result in habitat creation or enhancement. Similarly, a general permit could not be used to authorize a flood control project that may also result in creation or enhancement of some wetland habitat.

Other main factors to consider in deciding whether a project qualifies include:
1. Whether the project site is **degraded**
2. Whether the project is confined to **non-navigable waters** or waters that are navigable-in-fact **without stream history**
3. Whether the project includes activities beyond those listed in section NR 353.05.

All the requirements to qualify for a general permit are listed in sections NR 353 and on the general permit application form.

Compliance with Water Quality Certification Requirements
As part of the rule making process a water quality certification was issued for projects meeting the requirements of ch. NR 353, therefore an individual water quality certification is not required. However, an individual water certification can be required if felt warranted. Existing procedures for "recapture" should be followed when elevated to an individual certification to assure consistency with this approach.

The use of fill to construct berms, dikes, ditch plugs etc. was considered and analyzed in the development of ch. NR 353. If a project qualifies for a permit pursuant to ch. NR 353, then fill for these structures is authorized and a practical alternative analysis (PAA) is not required

Spreading of excavated or fill material
During rule development, discussions of allowed activities, included removing undesirable invasive species and leaving some of that vegetation in the wetland provided one buried only an equally undesirable plant community and one did not reduce the wetland area. For example. One could place reed canary grass and its root mass on top of an existing reed canary grass monoculture, but not over a wet meadow community with more diversity.
The "vegetation fill" is mostly organic matter (8-12 inches of dense roots and some soil) and so a 1:1 or 2:1 scrape to fill ratio typically retains wetland hydrology conditions throughout the site, especially where one also disables drains. The purpose of allowing "vegetation fill" is to make plant community restoration, as well as hydrologic restoration possible. Restoring a native herbaceous plant community in a reed canary grass monoculture requires removing reed canary grass sod. Some might be used as ditch fill material or bulldozed to adjacent non-wetland, but this usually uncovers only a small portion of the site. Unless one can haul more material away (seldom possible) or leave some in the wetland, introducing or managing for native herbaceous species is futile. The effect of not allowing "vegetation fill" is to discourage attempts to restore herbaceous native plant communities.

Thus the spreading of excavated or vegetative fill material on a wetland project site can be authorized by ch. NR 353.

Compliance with Environmental Analysis and Review Requirements
Except in non-federal wetlands all ch. NR 353 actions are a type 4 action and a public notice or press release is not required. In non-federal wetlands, Ch. NR 353 actions require a public notice or press release.

Application
MOA: Representative of the federal agency should fill out front of the general permit form and supply self-certification checklist. Landowner's signatures are not required. Restorationists should do state and federal endangered and threatened and cultural resources reviews as far as possible with the publicly available data.

Public: All other applicants should follow all directions on the general permit form (submit plans and narrative that demonstrates the project is wetland conservation as specified on form). If there is no berm or dike being proposed, the agent may sign for or in lieu of the landowner.

Fish entrapment
Under NR 353, the possibility of fish entrapment is a tolerated impact in exchange for the benefits of wetland conservation. Interference with fish passage is a specific concern listed in s. NR 353 and must be analyzed when it may occur.

Cold water resources
In general, the impact of wetland conservation projects adjacent to cold water streams is only an issue if excavation will significantly interrupt groundwater flow.

Seeding
NR 353 language regarding non-native or invasive species refers to "planned introduction" of these species. Annual cover crops do not constitute planned introduction. The use of a mixture of fast-germinating annual cover crop species (annual oats or rye) together with appropriate native species is recommended, but not required, in most wetland conservation activities.

Riprap
Any riprap approved or required for the proposed project should meet NRCS Standard 410. These standards are more flexible than the Department standard for basic shore stabilization because the hydraulics and hydrology are different.

Process
MOA - It is recommended that new or inexperienced field staff should initially conduct on-site meetings. After experience is gained it is appropriate to conduct in office reviews with site visits only on complex projects. It is also recommended that in-office meetings be held on likely upcoming projects.

Time Limits
From the date of receipt of a complete application, there is a 30-day presumptive approval for projects that comply with ch. NR 353 provisions.

Local Permits
Projects still need local permits. *Members of the Department Wetland Team, in cooperation with SEWRPC and the U.S. Fish and Wildlife Service are developing a list of wetland restoration projects that typically cause no adverse floodplain effects and as well as model ordinance language for county floodplain ordinances.*

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: August 4, 2005

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Wetland Team
Rivers and Habitat Protection Section
Lakes and Wetlands Section

FROM: Todd Ambs, Administrator
Water Division

SUBJECT: Guidance on Reviewing Wetland Compensatory Mitigation Proposals in Wetland Permitting

1999 Wisconsin Act 147 was signed into law in May 2000 and gave the department authority to consider wetland compensatory mitigation in wetland permitting or approval decisions. On February 1, 2002, revisions to NR 103, WI Admin. Code and the new Chapter 350, WI Admin. Code, went into effect. The legislation authorizing the wetland compensatory mitigation program, 1999 Wisconsin Act 147, and the administrative codes, NR 103 and NR 350, are available at www.legis.state.wi.us. The *Guidelines for Wetland Compensatory Mitigation in Wisconsin* is available at http://www.dnr.state.wi.us/org/es/science/publications/wetland_mitig.pdf.

The basic concepts that all staff should be communicating to applicants:

- Compensatory Mitigation involves wetland restoration or creation to "compensate" for wetland loss either through mitigation projects completed by the applicant or through the use of pre-approved "banks" in business to provide a mitigation service to applicants.
- Applicants must show that they have met the Practicable Alternatives Analysis to avoid and minimize wetland impacts (see Understanding the NR 103 Decision Process, February 2002).
  - Mitigation may be considered concurrently with avoid and minimize alternatives when wetland impacts are less than 0.1 acres; less than 1 acre, outside the 100-year floodplain, and not on certain types.
  - For all other projects, mitigation may be considered only after the applicant has met the Practicable Alternatives Analysis.
  - Mitigation may not be considered in decisions for cranberry operations or impacts to wetlands in an Area of Special Natural Resource Interest.
- Mitigation is voluntary and not a department requirement.
- When compensatory mitigation is part of an application, the applicant will need to follow detailed rules, requirements and review process for the mitigation project (NR 350 and the *Guidelines)* that have been established to assure that these projects are carried out in a manner that has a high likelihood for success.

The roles of the water management specialist (WMS), or other permit reviewer, and wetland restoration ecologist (WRE) in the compensatory mitigation projects are:

- The WMS will remain the initial point of contact on projects that may impact waterways or wetlands. The WMS will determine compliance with NR 103 and if compensatory mitigation should be considered as part of the NR 103 evaluation.
- When compensatory mitigation is being considered in a permit evaluation, the WMS should assume that the compensatory mitigation project will meet all rules and requirements and will be carried out in a manner that has a high likelihood for success.
- The WRE will be responsible for assuring that mitigation projects are in compliance with NR 350. The WRE will evaluate and work with the applicant to approve and monitor the actual compensatory mitigation project. Only the WRE has authority to approve mitigation projects that are a condition of water quality certification.

Successful implementation of this new program will demand effective communication between the Water Management Specialist and the Wetland Restoration Ecologist. Actual steps the Water Management Specialist and Wetland Restoration Ecologist should complete with each new application that includes an offer of compensatory mitigation are:

Pre-Application Conference or Initial Contact

Applicant:

- Should be able to describe the project, including the location and the estimated acreage of wetlands impacted and alternatives considered.

WMS:

- Determine which column of the Wetland Mitigation Process Table applies. If the proposed project can meet permitting or water quality certification standards without compensatory mitigation, proceed with the normal water quality certification process.

- If compensatory mitigation can be considered, direct the applicant to compensatory mitigation guidance material available on the mitigation web-site. Provide applicant with bank information if they are interested in that alternative.

- Discuss and agree with applicant the scope of alternative analysis required pursuant to NR 103.

- Give the applicant a "preliminary analysis of the potential for compliance with" NR 103. [NR 103.08(1)].

- Inform applicant that offering compensatory mitigation does not mean that the proposed project or compensatory mitigation will be approved.

Application Receipt

WMS:

- Review application for completeness; include “mitigation plan meeting state standards” as a needed item in request for information/completeness determination.

- Send mitigation materials to wetland restoration ecologist. Send a start review memo, copy of application materials and the mitigation materials to Pat Trochlell, FH/4 or Julia Wilcox, FH/4.

- Inform applicant of whom to contact with questions – the WMS for development project, the WRE for compensation mitigation.

WRE:

- Send a letter to the applicant introducing the mitigation process and elements needed for a complete application.

- Review mitigation plans for completeness pursuant to NR 350. Determine if compensation should be met on-site or at a mitigation bank.

- Determine if any permit will be required for the mitigation project itself. If so, contact WMS immediately and discuss.

- Coordinate with the Corps of Engineers on mitigation requirements.

Application Processing

WMS:

- Evaluate application per NR 103 category. The WMS is responsible to make the water quality certification decision including evaluating the project’s practical alternative analysis and assessing functions and values.

- Inform WRE of preliminary decision, especially if a decision is reached that the permit will be denied or that approval can be issued without compensatory mitigation.

WRE:

- Evaluate the compensatory mitigation relative to probability of success for providing functional values.

- Inform WMS and applicant of any deficiencies in the mitigation plan and whether the mitigation plan can be approved when any identified problems are fixed. If an on-site mitigation plan can be approved, tell the applicant to send the conservation easement and financial assurances to the WRE. If a mitigation bank purchase is approved, tell the applicant to send the affidavit of bank credit purchase to the WRE.

- Inform the WMS when the conservation easement and financial assurances or the affidavit of bank credit purchase have been received. Route the financial assurances to the Secretary for signature.

- Prepare wetland mitigation summary sheets for the file and inform the WMS of any special conditions needed for the permit/approval. Inquire if the WMS would like copies of any of the finalized mitigation documents.

- Inform the WMS, in writing, that the applicant has met all requirements of NR 350.

WMS:

- Issue permit with compensatory mitigation condition, citing final version of mitigation plan if an on-site plan was approved and any other special conditions. Send copy of permit to WRE.

On-site Mitigation Compliance

WRE:

- After permit has been issued, send conservation easement to Bureau of Facilities and Land. Keep financial assurances in a secure location.
- Maintain contact with consultants to monitor progress of mitigation project. Keep WMS informed of progress.
- Receive and review as-built report. Conduct site inspection. Recommend corrective actions if needed. If site has met construction goals, release construction financial assurances.
- Receive and review monitoring reports. After receipt of final monitoring report, conduct the final site inspection. Recommend corrective actions if needed. If site has met all performance standards, approve site and release remaining financial assurances.
- Inform WMS if significant non-compliance issue develops.

WMS:

- If mitigation documents (such as financial assurances or monitoring reports) are mistakenly sent to the WMS, forward all documents to the WRE.

Enforcement

WRE:

- Schedule an enforcement conference. Inform owners that the DNR will be pursuing access to the financial assurance funds if they choose not to address the site problems.

WMS:

- Assist WRE with enforcement actions if necessary.

Questions on specific mitigation projects should be directed to Pat Trochlell or Julia Wilcox.

Drafted by P. Scott Hausman, revised by Julia Wilcox and Pat Trochlell.

Approved: Aquatic Habitat Coordinators

Approved: Mary Ellen Vollbrecht *on* 8-1-05

Mary Ellen Vollbrecht, Section Chief *Date*

Approved: _____ *on* 8/4/05

Todd Ambs, Administrator *Date*